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IS JUDICIAL REVIEW OF ADMINISTRATIVE ACTION GUARANTEED BY THE BRITISH NORTH AMERICA ACT?*

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Toronto

I. *The Judicature Sections of the British North America Act.*

Section 96 of the British North America Act¹ provides that "the Governor General shall appoint the judges of the superior, district and county courts in each province". Sections 97 and 98 provide that the judges of the courts in each province shall be selected from the bar of the province. Section 99 guarantees the tenure of the judges of "the superior courts" until a retirement age of seventy-five. Section 100 provides that the salaries of the judges of "the superior, district and county courts" shall be "fixed and provided by the Parliament of Canada". Section 101 gives to the federal Parliament the legislative power to establish federal courts.

It is strange to find in a federal constitution that the federal government is charged with appointing the judges of the provinces' higher courts. The theory at the time of confederation appears to have been that federal appointment would reinforce judicial independence by insulating the judges from local pressures. The Privy Council later wholeheartedly accepted this theory, describing section 96 as one of the "principal pillars in the temple of justice",² and as "at the root of the means adopted by the framers of the [B.N.A. Act] to secure the impartiality and independence of the Provincial judiciary".³

It would be very difficult to document this theory that judicial independence is better served by federal appointments than it would be served by provincial appointments. But Canadians have

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¹ 1867, 30 & 31 Vic., c. 3 (U.K.), hereinafter cited as B.N.A. Act.

² *Toronto v. York*, [1938] A.C. 415, at p. 426.

³ *Martineau & Sons Ltd v. Montreal*, [1932] A.C. 113, at p. 120.

become accustomed to section 96; there has been very little criticism of it, and no move by the provinces to secure its repeal. In any event section 96 and its associated provisions are part of the B.N.A. Act, and the courts can hardly be blamed for enforcing them. The doctrine which the courts have developed is that a province is not permitted to evade section 96 by investing a tribunal with jurisdiction of a kind which ought properly to be exercised by a superior, district or county court, and by calling that body an inferior court or an administrative tribunal. When this occurs, the courts have held that the tribunal, whatever its official name, is for constitutional purposes a superior, district or county court and must satisfy the requirements of section 96 and the other judicature sections of the B.N.A. Act. What this means is that the tribunal will be invalidly constituted unless its members (1) are appointed by the federal government in conformity with section 96, (2) are drawn from the bar of the province in conformity with sections 97 and 98, and (3) receive salaries which are fixed and provided by the federal Parliament in conformity with section 100.⁴

So far the law is clear, and the policy underlying it is comprehensible. But the courts have not succeeded in fashioning a clear definition of those functions which ought properly to belong to a superior, district or county court. Naturally, this has led to considerable uncertainty as to the extent of provincial power to establish and empower new inferior courts and administrative tribunals.

II. Establishment of Administrative Tribunals.

Fortunately, the uncertainty as to the provincial power to establish administrative tribunals was considerably relieved by the Privy Council in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*⁵ In upholding the validity of the Labour Relations

⁴ The principal modern literature on the implications to be drawn from ss 96-100 of the B.N.A. Act is J. Willis, *Administrative Law and the B.N.A. Act* (1939), 53 Harv. L. Rev. 251, at pp. 261-271; Section 96 of the B.N.A. Act (1940), 18 Can. Bar Rev. 517; M. C. Shumiatcher, *Section 96 of the B.N.A. Act Re-examined* (1949), 27 Can. Bar Rev. 131; B. Laskin, *Municipal Tax Assessment and Section 96 of the B.N.A. Act* (1955), 33 Can. Bar Rev. 993; W. R. Lederman, *The Independence of the Judiciary* (1956), 34 Can. Bar Rev. 769 and 1139, at pp. 1158-1179; B. Laskin, *Comment* (1963), 41 Can. Bar Rev. 446; G. Pépin, *Les tribunaux administratifs et la constitution* (1969), Part I; J. N. Lyon, *Comment* (1971), 49 Can. Bar Rev. 365; G. E. LeDain, *Sir Lyman Duff and the Constitution* (1974), 12 Osgoode Hall L.J. 261, at pp. 325-336.

⁵ [1949] A.C. 134.

Board of Saskatchewan, the Privy Council settled that a province could create an administrative tribunal to administer a new regulatory scheme, and could give to that tribunal the power to adjudicate disputes including the power to make findings of relevant law and fact. Although these functions, regarded by themselves, were analogous to the functions of a superior, district or county court, the analogy disappeared when the new tribunal's powers were placed in the context of a new regulatory scheme, such as the regime of collective bargaining. Since *John East*, the provincial power to establish and empower administrative tribunals has been relatively secure, and there is no reason to suppose that section 96 difficulties have frustrated the development of administrative tribunals in the provinces.⁶

III. *Protection of Administrative Tribunals from Judicial Review.*

It is clear that even questions of law can be assigned to provincial administrative tribunals, so long as they are part and parcel of a jurisdiction which is not analogous to that of a superior, district or county court. In *John East*, for example, it was obvious that the labour board would often have to interpret the language of its statute and decide other questions of law in the course of adjudicating upon labour relations disputes; and this was expressly acknowledged by the Privy Council.⁷

What is not so clear is whether a province's legislative power to assign questions of law to a provincial administrative tribunal is based on the premise that the tribunal's decisions will be subject to superior-court review. The decisions of inferior courts and administrative tribunals have for centuries been subject to review by superior courts through the prerogative writs of *certiorari*, prohibition, *mandamus*, *quo warranto* and *habeas corpus*; and in more recent times by ordinary actions for a declaration or an injunction, and even more recently in some jurisdictions by special statutory remedies such as Ontario's new application for judicial review. To the extent that superior-court review is available, the

⁶ See, e.g., *Dupont v. Inglis*, [1958] S.C.R. 535 (Mining Commissioner); *Brooks v. Pavlick*, [1964] S.C.R. 108 (Master of Titles); *Tremblay v. Commission des Relations de Travail du Québec*, [1967] S.C.R. 697 (Labour Relations Board); *Tomko v. Labour Relations Board (N.S.)*, Supreme Court of Canada, December 19th, 1975, not yet reported (Labour Relations Board). One area of continuing difficulty is municipal tax assessment, where the courts have arguably not been faithful to the *John East* test: Laskin, *Canadian Constitutional Law* (4th ed. rev., 1975), pp. 784-788; *Re Minister of Municipal Affairs* (1972), 24 D.L.R. (3d) 534.

⁷ *Supra*, footnote 5, at pp. 149-151.

establishment of a new inferior court or tribunal does not involve a total exclusion of superior-court jurisdiction.

Professor J. N. Lyon has argued in the *Canadian Bar Review*⁸ that it is the availability of judicial review which protects from the strictures of section 96 administrative tribunals with authority to decide questions of law. The argument runs along these lines. Questions of law may be assigned to a provincially-appointed administrative tribunal, but only if the tribunal's decision is subject to review by a superior court. If the tribunal's decision is not subject to review by a superior court, then the tribunal will be exercising a jurisdiction analogous to that of a superior court and its powers will be invalid.

The significance of Professor Lyon's view is that it would accord constitutional protection to superior-court review, which would mean that an attempt by a provincial legislature to abolish the power of judicial review would be constitutionally bad as offensive to section 96. In other words, administrative law, or at least that branch of it which is concerned with judicial review of administrative action, would be seen to rest on a constitutional foundation, and not merely on a common law and statutory foundation as is conventionally supposed.

It is common for a legislature, when establishing an administrative tribunal, to include in the constituent statute a "privative clause", which is a provision purporting to exclude or restrict judicial review of the tribunal's decisions. Privative clauses come in a variety of fairly standard forms: the "finality clause" declares that the decisions of the tribunal shall be "final" and not subject to review; the "exclusive jurisdiction" clause declares that the tribunal's jurisdiction to decide issues before it is exclusive and unreviewable; the "no-*certiorari* clause" declares that *certiorari* and other remedies which would otherwise be available for review purposes are not available to review the tribunal's decisions; and one could also include "notice clauses" and "limitation clauses" which exclude review unless prior notice has been given or unless proceedings are brought within a short time. The superior courts have tended to give only limited effect to privative clauses. They have reasoned that any given privative clause could not have been intended to exclude judicial review in cases where the tribunal has (in the court's opinion) exceeded its "jurisdiction", and they have accordingly "interpreted" the privative clause as not protecting a tribunal decision which is vitiated by a "jurisdictional"

⁸ *Op. cit.*, footnote 4.

error.⁹ In most cases it is at least arguable that the legislature did intend to protect the decisions of its tribunal, even when vitiated by "jurisdictional" error. But the courts have consistently undermined the apparent legislative intent by giving privative clauses a narrow reading. Notice however that the courts' technique has been one of statutory interpretation. With one or two exceptions,¹⁰ the courts have not placed their avoidance of privative clauses on any constitutional ground. If however judicial review is constitutionally guaranteed, then of course privative clauses in provincial statutes are simply unconstitutional, and the results which the courts have reached as a matter of interpretation were in fact compelled by the judicature provisions of the B.N.A. Act.

By way of digression, it should be noticed that privative clauses which purport to exclude a superior-court decision as to the constitutionality of a statute are in a different category. They have been held ineffective on constitutional grounds, not because of section 96, but because the B.N.A. Act's distribution of powers has been assumed to require implicitly that the courts police the distribution to prevent usurpation by a legislative body of powers which do not belong to it.¹¹ For similar reasons, where an administrative tribunal is placed in the invidious position of having to decide a constitutional issue, its decision must be subject to review by a superior court notwithstanding any privative clause. A common case is where a provincial labour relations board has to decide whether a particular industry is within federal or provincial jurisdiction.¹² Since a provincial legislature has no power to regulate labour relations in an industry within federal jurisdiction,

⁹ For a brief review of the Canadian case law and literature, see Hogg, *The Supreme Court of Canada and Administrative Law, 1949-1971* (1973), 11 *Osgoode Hall L.J.* 187, at pp. 196-204.

¹⁰ See *infra*, footnote 50.

¹¹ See Laskin, *op. cit.*, footnote 6, p. 96; Strayer, *Judicial Review of Legislation in Canada* (1968), pp. 36-38; *Thorson v. A.G. Can.* (No. 2) (1974), 43 D.L.R. (3d) 1, at p. 11. By parity of reasoning (although the point is less clear where jurisdiction is being transferred from one superior court to another and both are subject to the appellate jurisdiction of the Supreme Court of Canada), it may be doubted whether the federal Parliament has the power to invest in the Federal Court of Canada the exclusive jurisdiction to determine constitutional issues which would formerly have been decided by the provincial superior courts: see *infra*, footnote 41.

¹² This occurs frequently. Two recent examples which reached the Supreme Court of Canada are *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers* (1973), 40 D.L.R. (3d) 105 and *Canada Labour Relations Board v. C.N.R. Co.* (1974), 45 D.L.R. (3d) 1.

it cannot authorize a provincial tribunal to determine conclusively whether or not a particular industry is within provincial or federal jurisdiction; otherwise, the tribunal by a wrong decision on the classification of the industry could extend provincial power into the forbidden federal area.¹³

Setting aside the special case where an administrative tribunal's decision is constitutionally vulnerable, the claim that judicial review of administrative action is generally guaranteed by the constitution is a very large claim indeed. In the United States, where judicial review is widely revered, it might be expected that either or both of the separation of powers doctrine or the due process clause would have been held to afford a constitutional guarantee of judicial review of administrative action. But, despite occasional suggestions of such a doctrine, the Supreme Court of the United States has not been prepared to accept it; nor have most state courts. It is reasonably clear that the federal Congress and most state legislatures are free if they choose to enact privative clauses precluding judicial review of administrative action, even on questions of law or jurisdiction, although probably not on questions of constitutionality.¹⁴ Considering that the B.N.A. Act differs from the United States constitution in its lack of a separation of powers doctrine, its lack of a bill of rights, and its general adoption (admittedly with exceptions) of British notions of parliamentary supremacy, it would be surprising to find that judicial review of administrative action was constitutionally guaranteed in Canada but not in the United States.

¹³ This is known as the doctrine of "constitutional jurisdictional facts" in Australia and the United States: Brett and Hogg, *Cases and Materials on Administrative Law* (2nd ed., 1967), pp. 203-204; Davis, *Administrative Law Treatise* (1958), ss 16.08, 29.08, 29.09. Curiously, the doctrine does not find much support in Canadian cases, but it is almost certainly the law: Strayer, *op. cit.*, footnote 11, at pp. 56-58.

¹⁴ Privative clauses are not as common in the U.S.A. as they are in Canada, and so the case-law is not as extensive as one might expect. For full discussion, see Davis, *op. cit.*, *ibid.*, ss 28.18, 28.19, 29.08; Jaffe, *Judicial Control of Administrative Action* (1965), pp. 353-357, 376-394. For discussion of the constitutionality of the sweeping privative clause in the Veterans Administration statute, see R. L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits* (1975), 27 *Stanf. L. Rev.* 905. The assertion that judicial review is constitutionally guaranteed, which was made by J. Willis in *Administrative Law and the B.N.A. Act*, *op. cit.*, footnote 4, at p. 271, was probably justified by the state of the authorities when he wrote, but is not correct in the light of developments since then. The American case-law may be of direct relevance to Canada now that the Canadian Bill of Rights and the Alberta Bill of Rights include "due process" clauses.

To say that a result is surprising is not to say that it is impossible. We must therefore turn to the Canadian cases which are relied upon by Professor Lyon for his constitutional guarantee of judicial review. Is it plausible to explain the *John East* decision as resting on the premise that the decisions of the Labour Relations Board of Saskatchewan would be subject to superior-court review? There was in fact a privative clause in the *John East* case, and it was argued "that a tribunal, whose decisions were not subject to appeal and whose proceedings were not reviewable by any Court of Law or by any certiorari or other proceedings whatsoever, must be regarded as a Superior Court or a Court analogous thereto".¹⁵ The Privy Council rejected the argument in these words:¹⁶

But the same considerations which make it expedient to set up a specialized tribunal may make it inexpedient that that tribunal's decisions should be reviewed by an ordinary Court. It does not for that reason become itself a "Superior" Court.

If this was all that their Lordships had said, it would have been clear that the argument was without force. But they added two more sentences:¹⁷

Nor must its immunity from certiorari or other proceedings be pressed too far. It does not fall to their Lordships upon the present appeal to determine the scope of that provision but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act.

It is possible that these two sentences could be read as qualifying the earlier passage and stipulating that judicial review was a constitutional necessity.¹⁸ But it seems much more likely that their lordships were simply pointing out that the privative clause would not in fact be interpreted as effective to exclude judicial review for jurisdictional error.¹⁹ This was a relevant point to make, because it provided a second reason for rejecting the argument based on the privative clause: since this privative clause would not in fact be effective to exclude judicial review, an argument based on the clause having effectively excluded judicial review must fail. This is very different from the proposition that no privative clause, however framed, could, as a matter of constitutional law, exclude judicial review.

¹⁵ *Supra*, footnote 5, at p. 151.

¹⁶ *Ibid.*, at pp. 151-152.

¹⁷ *Ibid.*, at p. 152.

¹⁸ Lyon, *op. cit.*, footnote 4, at pp. 367-368.

¹⁹ Accord, H. W. Arthurs, *The Dullest Bill: Reflections on the Labour Code of British Columbia* (1974), 9 U.B.C. L. Rev. 280, at p. 333.

That the availability of judicial review was not an essential element of the *John East* decision is confirmed by other cases in which the courts have considered rights of appeal to a superior court from inferior courts or tribunals. If it is the availability of judicial review which validates the conferral of adjudicatory jurisdiction on administrative tribunals, then one would expect to find that the availability of an appeal to a superior court would tend to validate an assignment of section 96 functions to a provincially-appointed court or tribunal.²⁰ But this is not what has happened. In *A.G. Ont. v. Victoria Medical Building Ltd.*,²¹ the Supreme Court of Canada struck down a provision of Ontario's Mechanics' Lien Act which purported to confer upon a master of the Supreme Court the jurisdiction to try mechanics' lien actions. The Act permitted any party to apply to the Supreme Court for an order directing that the trial be held before a judge of the Supreme Court. In cases where the trial was held before the master there was a right of appeal to the Court of Appeal from the master's decision. The Supreme Court of Canada held that the continuing presence of superior-court jurisdiction, both original and appellate, did not validate the assignment of jurisdiction to the master. There are many other cases where section 96 jurisdiction has been unconstitutionally conferred upon a provincially-appointed court or tribunal, and where there was a right of appeal to the superior court. In such cases superior-court jurisdiction is not totally excluded; it is simply relegated to an appellate role. But the existence of the right of appeal has never been held sufficient to save, or even as tending to save, the otherwise invalid assignment of section 96 jurisdiction to the provincially-appointed court or tribunal.²²

If, as appears to be the case, a right of appeal to a superior court will not validate an assignment of section 96 jurisdiction to

²⁰ This conclusion does not follow inevitably, since it is conceivable that judicial review is a necessary but not a sufficient condition of constitutional validity. But the tenor of the cases cited in the following two notes give no support whatever for such a subtle position.

²¹ [1960] S.C.R. 32.

²² E.g., *C. Huebert Ltd v. Sharman*, [1950] 2 D.L.R. 344; *Schrier v. Bernstein* (1962), 33 D.L.R. (2d) 305; *Re Judicature Amendment Act*, 1970 (No. 4) (1971), 18 D.L.R. (3d) 385; *Re Minister of Municipal Affairs* (1972), 24 D.L.R. (3d) 534 (the irrelevance of a right of appeal is explicit at pp. 542-543, per Bugold J.A.); *Seminary of Chicoutimi v. A.G. Que.*, [1973] S.C.R. 681. In *Dupont v. Inglis*, [1958] S.C.R. 535 counsel turned the argument around and argued that the existence of a right of appeal from the Mining Commissioner to a superior court showed that the Commissioner must be exercising judicial power of a superior court character. This argument was rejected: *ibid.*, at p. 543.

an inferior court or tribunal, it seems most unlikely that it is the existence of superior-court review (which is of course ordinarily more limited than an appeal) which is what validates the assignment of some adjudicatory functions to administrative tribunals. The true position appears to be that the judicature provisions of the B.N.A. Act prohibit the assignment of section 96 functions to inferior courts or tribunals whether or not there is a right of appeal to or review by a section 96 court. If this is so then the rationale of *John East* is simply that the functions assigned to the Labour Relations Board of Saskatchewan were not section 96 functions. The presence or absence of judicial review was irrelevant.

IV. *Denial of Superior Court's Review Functions.*

So far I have attempted to argue that the mere fact that a tribunal's decisions are unreviewable by the courts does not make that tribunal a superior, district or county court within section 96 of the B.N.A. Act. But a constitutional guarantee of judicial review could still be supported on the basis of a slightly different argument. It could be argued that because judicial review has always been part of the functions of the superior courts, it is unconstitutional to take the function away from them. This argument emphasizes not the conferral of conclusive powers on the tribunal, but the taking away of review powers from the superior courts. Professor W. R. Lederman, in his important article on "The Independence of the Judiciary", has argued that it would be contrary to the judicature sections of the B.N.A. Act to take away a superior court's review functions.²³ There is, he says, an "implied guarantee of jurisdiction" buried in the judicature sections of the B.N.A. Act.²⁴ Assuming for the moment that this theory is a possible one, what would be included in the superior courts' implied guarantee of jurisdiction?

Professor Lyon takes the position that the constitutional guarantee of superior-court jurisdiction encompasses the review of all "questions of law" determined by administrative tribunals. This position depends on the assumption that, in the absence of a privative clause, a superior court always has power to review questions of law decided by an administrative tribunal. But in fact the superior courts in exercise of their review powers under the prerogative writs never asserted so extensive a power. Only the writ of *certiorari* allowed review of questions of law as such, and

²³ *Op. cit.*, footnote 4, at p. 1174.

²⁴ *Ibid.*, at p. 1172.

then only if the error appeared on the face of the record. All of the other supervisory remedies allowed review of questions of law only if the question was one which marked out the limits of the tribunal's jurisdiction. To be sure, the vagueness of the concept of jurisdiction did sometimes lead an interventionist court to review an error of law which did not really have a bearing on the tribunal's jurisdiction,²⁵ but it is quite clear that not all questions of law have traditionally been reviewable. That being so, it is impossible to maintain the proposition that review of all questions of law is a constitutionally protected function of the superior courts. In addition, there is a decision of the Supreme Court of Canada which squarely denies the proposition. In *Farrell v. Workmen's Compensation Board*,²⁶ one of the rare cases in which a privative clause has been held effective, the court rejected an argument based on section 96 and held that a privative clause in a Workmen's Compensation Act successfully precluded superior-court review of questions of law as well as fact decided by the Workmen's Compensation Board.²⁷

Farrell still leaves room for an argument that section 96 prohibits a provincial legislature from taking away the superior court's power to review *jurisdictional* questions decided by administrative tribunals.²⁸ In this restricted form, Professor Lyon's argument would be more persuasive. It is this position which is urged by Professor Lederman: "The provinces cannot deny to the superior courts power to review and determine finally the scope of statutory and common law powers conferred on provincial government officials or on provincial minor courts or non-curial tribunals."²⁹ Whether this proposition is correct or not has never

²⁵ See Hogg, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada* (1971), 9 Osgoode Hall L.J. 203.

²⁶ [1962] S.C.R. 48.

²⁷ Professor Lyon seeks to distinguish this case on the basis that the Workmen's Compensation Board did not have to decide any legal question anyway, because its statute said that it was to decide "upon the real merits and justice of the case" and was not bound to follow "strict legal precedent". The Supreme Court however explicitly assumed that the Board would be deciding questions of law and held that the privative clause was effective to protect such decision: *ibid.*, at p. 51. Moreover, Professor Lyon's explanation involves acknowledging that a "real merits and justice" clause (which is really little more than a kind of "exclusive jurisdiction" clause) is an effective privative clause, which if true makes the avoidance of s. 96's alleged protection of judicial review simply a matter of legislative drafting.

²⁸ See Laskin, *op. cit.*, footnote 6, p. 766.

²⁹ *Op. cit.*, footnote 4, at p. 1174. For cautious support, see G. E. LeDain, *op. cit.*, footnote 4, at pp. 334-336.

had to be decided because of the courts' steadfast refusal to interpret privative clauses as purporting to exclude judicial review for jurisdictional error.³⁰ When a legislative draftsman is bold enough and clever enough to produce such a clause,³¹ or when the courts alter their interpretations of the existing standard clauses, then the courts will have to face the issue.

When the issue does have to be decided I believe the courts should and will uphold the privative clause. In the first place, it is doubtful whether the language of section 96 will support the inference of a guaranteed superior-court jurisdiction. After all, section 96 simply provides for the appointment of superior, district and county court judges. One can understand why the courts have insisted that when a new jurisdiction is conferred upon an inferior court or tribunal the new jurisdiction must not be a judicial function analogous to that of a superior, district or county court.³² This insistence has pushed section 96 a long way beyond a simple provision for appointment of judges by the federal government. But if we can accept that section 96 implicitly limits the kinds of functions which may be conferred upon inferior courts and tribunals, it is hard to take the further step and read section 96 as also limiting the kinds of functions which may be taken away from the superior, district or county courts. Professor Lederman argues that the "implied guarantee of jurisdiction" may be inferred not from section 96 alone, but "from the cumulative effect of all the judicature sections of the B.N.A. Act".³³ But it is not easy to see how the inference is much strengthened by the addition of the other judicature sections of the B.N.A. Act, namely, sections 97 to 101, dealing with legal qualifications, tenure and payment of judges, and with the creation of federal courts.

The inference of an implied guarantee of jurisdiction in the judicature sections of the B.N.A. Act is especially difficult to accept when one considers that the B.N.A. Act does not guarantee other civil libertarian values.³⁴ The absence of a bill of rights in the

³⁰ See text accompanying footnote 9, *supra*.

³¹ The Labour Code of British Columbia, S.B.C., 1973, c. 122, s. 33, as am., 1975, c. 33, includes a clause which purports to confer on the Labour Relations Board the power "to determine the extent of its jurisdiction" and "to determine any fact or question of law that is necessary to establish its jurisdiction". The constitutionality of this clause has been admirably analyzed by H. W. Arthurs, *op. cit.*, footnote 19, at pp. 335-337.

³² See text accompanying footnote 4, *supra*.

³³ *Op. cit.*, footnote 4, at p. 1172.

³⁴ This anomaly is emphasized by Arthurs, *op. cit.*, footnote 19, at p. 331.

B.N.A. Act reflected a preference on the part of the Canadian framers for British rather than American constitutional ideas. As the preamble to the B.N.A. Act declares, Canada was to have "a constitution similar in principle to that of the United Kingdom". One consequence of this premise was that the powers of the Legislatures were to be "as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow".³⁵ Needless to say, the B.N.A. Act could and did impose limits on the powers of the provincial legislatures, but new limits should not be inferred from language which is at best equivocal.³⁶ One limit which is established by the cases is that the judicature sections of the B.N.A. Act prohibit the conferral of review powers on a provincially-appointed court or tribunal;³⁷ but I submit that the existing doctrine should not be extended so as also to prohibit the taking away of a superior court's review powers.

In *Pringle v. Fraser*,³⁸ the Supreme Court of Canada held that the federal Parliament, in exercise of its power over immigration, could establish an Immigration Appeal Board to review deportation orders, and could preclude review by the provincial superior courts of the decisions of the Board even on jurisdictional questions. Laskin J., as he then was, delivering the judgment of the whole (nine-judge) court, said that "certiorari, as a remedial proceeding, has no necessary ongoing life in relation to all matters for which it could be used, if competent excluding legislation is enacted".³⁹ In *A.G. Can. v. Canard*,⁴⁰ Beetz J. held that the Federal Court Act, which by sections 18 and 28 purports to confer upon the Federal Court of Canada the exclusive power to review the decisions of a "federal board, commission or other tribunal", did effectively deny to the provincial superior courts the power to review the decisions taken by a Minister under the authority of the Indian Act. It is reasonably clear, therefore, that, at least where no constitutional (distribution of powers) question

³⁵ *Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 132.

³⁶ The same criticism is, in my view, applicable to the occasional suggestions that there is an "implied bill of rights" in the B.N.A. Act. Only one judge of the Supreme Court of Canada has ever unequivocally espoused such a notion, namely, Abbott J. in *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 328; for all the references, see Laskin, *op. cit.*, footnote 6, at pp. 900.20-900.25.

³⁷ *Seminary of Chicoutimi v. A.G. Que.*, *supra*, footnote 22.

³⁸ [1972] S.C.R. 821.

³⁹ *Ibid.*, at pp. 826-827.

⁴⁰ (1975), 52 D.L.R. (3d) 548, at p. 583.

is involved,⁴¹ the federal Parliament can take away the review powers of the provincial superior courts.⁴²

Now it may be objected that *Pringle v. Fraser* and *A.G. Can. v. Canard* were concerned with the federal Parliament, and that the judicature sections of the B.N.A. Act impose a restraint only upon the provincial legislatures. But while it is widely accepted that the judicature sections (other than section 101) apply only to courts created by the provincial legislatures,⁴³ surely the theory of a constitutionally-guaranteed core of provincial superior-court jurisdiction requires that the guaranteed core of jurisdiction be invulnerable to federal as well as provincial legislative attack. Since superior-court review powers may be taken away by the federal Parliament, it follows that the alleged core of jurisdiction is either protected by a remarkably inadequate guarantee or it is not guaranteed at all.

There are two recent cases which suggest that the latter alternative is correct, that is to say, that the provincial legislatures as well as the federal Parliament may take away the review powers of the provincial superior courts. The first case, *Farrell v. Workmen's Compensation Board*,⁴⁴ has already been mentioned. In that case the court was dealing with a standard privative clause and accordingly only decided that review of errors of law and fact within jurisdiction could be excluded; but the section 96 argument to the contrary was dismissed by the Supreme Court of Canada so peremptorily and absolutely as to suggest that the

⁴¹ Neither *Pringle v. Fraser*, *supra*, footnote 38, nor *A.G. Can. v. Canard*, *ibid.*, had to decide whether the federal Parliament could withdraw the power of a provincial superior court to determine a constitutional question. The language of s. 101 of the B.N.A. Act, referring to "the better administration of the laws of Canada", does not suggest the existence of any such power; and the privative clause cases suggest the absence of any such power: *supra*, footnote 11. *Denison Mines Ltd v. A.G. Can.*, [1973] 1 O.R. 797, 32 D.L.R. (3d) 419 (Ont. H.C.) may be wrongly decided on this point: Dale Gibson, Comment (1976), 54 Can. Bar Rev. 372.

⁴² It is worth noting too, in case it should be thought to be relevant, that neither the Immigration Appeal Board nor the Federal Court satisfies the stipulations of the judicature sections of the B.N.A. Act, because in each case the members or judges retire at age 70, which is inconsistent with s. 99's guarantee of tenure until age 75.

⁴³ Laskin, *op. cit.*, footnote 6, at p. 762; *A.G. Can. v. Canard*, *supra*, footnote 40, at p. 551, per Laskin C.J., but compare the more guarded statements by Beetz J., at pp. 572, 573, 578. Lederman takes the view that the judicature sections apply to the federal courts as well: *op. cit.*, footnote 4, at p. 1176.

⁴⁴ *Supra*, footnote 26 and accompanying text.

argument would be unavailable even with respect to a more sweeping clause.⁴⁵

The second case is even more suggestive. In *Woodward Estate v. Minister of Finance*,⁴⁶ a privative clause in British Columbia's Succession Duty Act was in issue. The Act exempted from succession duty property bequeathed to charitable organizations, and it empowered the provincial Minister of Finance to determine whether or not an organization was charitable. The Minister made a determination that the Woodward Foundation was not charitable, but the determination was made in breach of natural justice. After the Minister had made his determination, the British Columbia Legislature amended the Succession Duty Act by adding a privative clause in the following terms:⁴⁷

... the determination of the Minister is final, conclusive, and binding on all persons and ... is not open to appeal, question, or review in any court, and any determination of the Minister made under this subsection is hereby ratified and confirmed and is binding on all persons.

This amendment was expressly made retrospective so that it applied to the Minister's Woodward determination. The Supreme Court of Canada assumed that a standard privative clause would be ineffective to preclude review of a determination made in breach of natural justice (this being equivalent to a jurisdictional error). The clause in this case was a standard one, except for the last phrase declaring that any determination "is hereby ratified and confirmed". "Without these words", the court said, "the Minister's determination would have been without legal force or effect, but it cannot be treated as though it had never existed"; the effect of the ratifying and confirming words was to "breathe life into" the otherwise invalid determination; it followed that the decision, having "received statutory confirmation", could not be reviewed by the court.⁴⁸

The *Woodward* case is exceptionally interesting in that superior-court review *on jurisdictional grounds* was successfully precluded by the legislature. However, because the privative enactment was retrospective in its application to the Woodward determination, the case is not a direct authority on the efficacy of

⁴⁵ The dictum rejecting the s. 96 argument was approved again by the Supreme Court of Canada in *Brooks v. Pavlick*, *supra*, footnote 6, at p. 118.

⁴⁶ [1973] S.C.R. 120.

⁴⁷ S.B.C., 1970, c. 45, s. 5(2).

⁴⁸ *Supra*, footnote 46, at p. 129.

prospective preclusion of judicial review on jurisdictional grounds. Nevertheless, it was argued in the case that the sweeping privative clause offended sections 96 to 100 of the B.N.A. Act by giving the Minister powers analogous to those of a superior, district or county court judge. This argument was rejected by the Supreme Court of Canada.⁴⁹ They drew no distinction between this clause and a prospective clause, and indeed they rejected the argument so summarily (without calling for argument in reply) as to suggest that it would not be available with respect to a prospective clause either.⁵⁰

It is occasionally argued that there are good policy reasons for excluding the superior courts from some areas of regulatory law, for example, labour law, where their intervention has not been beneficial.⁵¹ For my part, I do not believe that it would ever be wise for a legislature to exclude judicial review of agency decisions altogether.⁵² But one must not confuse what is unwise with what is unconstitutional, and in my view section 96 is too frail a foundation to support the building of a constitutionally-guaranteed administrative law.⁵³

⁴⁹ *Ibid.*, at p. 126.

⁵⁰ In support of the Lederman-Lyon position, there is the equivocal dictum in the *John East* case which was discussed earlier (see text accompanying footnotes 15-19, *supra*) and a few other dicta cited in Laskin, *op. cit.*, footnote 6, pp. 764-766; for comment, see Laskin, Comment (1963), 41 Can. Bar Rev. 446; Arthurs, *op. cit.*, footnote 19, at p. 330.

⁵¹ See P. C. Weiler, *The Slippery Slope of Judicial Intervention* (1971), 9 Osgoode Hall L.J. 1.

⁵² See P. W. Hogg, *Judicial Review: How Much Do We Need?* (1974), 20 McGill L.J. 157.

⁵³ I am grateful to my colleagues, Professors Bill Angus, John Evans and Garry Watson, each of whom read a draft version of this paper and made suggestions for its improvement.